Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MICHAEL A. WILKINS,

Petitioner,

v.

DISCIPLINARY COMMISSION OF THE SUPREME COURT OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

RONALD E. ELBERGER
BOSE MCKINNEY & EVANS LLP
2700 First Indiana Plaza
135 N. Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

G. DANIEL KELLEY, JR.
Counsel of Record
THOMAS E. MIXDORF
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

Counsel for Petitioner

180524

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(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether an attorney's advocacy in an appellate brief challenging an appellate decision as result-based ignoring law and fact is speech protected by the First Amendment against disciplinary charges as rhetorical hyperbole incapable of being proven false by the charger?

2. Whether such advocacy is protected by the First Amendment unless made with actual malice proven by clear and convincing evidence?

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Michael A. Wilkins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Indiana.

OPINION BELOW

The 3-2 opinion of the Indiana Supreme Court as to which review is sought is reported at 777 N.E.2d 714 (Ind. 2002), reproduced App. A. Subsequently, a Justice recused by an opinion reported at 780 N.E.2d 842 (Ind. 2003), reproduced at App. B. The opinion on rehearing, a 2-2 split on conviction issues and 3-1 decision on punishment, is reported at 782 N.E.2d 985 (Ind. 2003), reproduced at App. C.

STATEMENT OF JURISDICTION

The Indiana Supreme Court entered its decision on rehearing, February 4, 2003. App. 28a. Petitioner evokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments of the Constitution of the United States of America:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Charge. Wilkins was charged by the Indiana Disciplinary Commission with making three statements in a petition for transfer (review)[1] to the Indiana Supreme Court and brief in support that he knew to be false, or with reckless disregard as to their truth or falsity, concerning the integrity of a judge in violation of Indiana Rule of Professional Conduct 8.2(a) (ABA Model Rule 8.2(a)).[2] Two charges were ultimately dismissed as the statements were found to be merely recitations of the requirements for a petition for transfer under the then-applicable Indiana Rules of Appellate

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1. The Petition addressed the Indiana Court of Appeals decision in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834 (Ind. App. 1998), with the Opinion by Judge Darden, concurred in by Judge Garrard, and concurred in result by Judge Rucker, who was subsequently appointed to the Indiana Supreme Court.

2. Rule 8.2(a) provides: "A lawyer shall not make a statement that the lawyer knows to be false or with regardless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . ."

Procedure. *In re Wilkins*, 777 N.E.2d 714, 716-717 (Ind. 2002) (App. 6a-7a) ("*Wilkins I*"). However, the second of these statements stated as grounds for review as required by the Indiana appellate rules that the lower court had misstated facts and misapplied the law as follows:

> "The Court of Appeals' published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are **directly** on point. Clearly, such a decision should be reviewed by this Court: . . .[2]" (Emphasis in original.) (App. 4a)

and included the following footnote 2:

> Indeed, the Opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision). (App. 4a)

(hereafter "footnote 2").[3]

Pursuant to Indiana's disciplinary rules, a hearing was held before a hearing officer. Despite unrefuted evidence that Wilkins intended in footnote 2 to question whether the

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3. Prior to the charge, Petitioner had already received a severe sanction for the footnote. When it received the transfer brief, the Indiana Supreme Court, acting *sua sponte* through its contempt powers, struck the brief, concluding that footnote 2 was "[a] scurrilous and intemperate attack on the integrity of the Court of Appeals." *Michigan Mutual Insurance Company v. Sports, Inc.*, 706 N.E.2d 555 (Ind. 1999). The Court then denied the Petition.

appellate decision was result-based ignoring law and fact, and despite the Commission's burden to prove its charges by clear and convincing evidence, the hearing officer found that Wilkins violated Rule 8.2(a) by signing a brief that included footnote 2 and recommended a thirty-day suspension.[4]

Petitioner Raised First Amendment Issues. Following the Hearing Officer's recommendation, Wilkins petitioned the Supreme Court of Indiana for *de novo* review of the hearing officer's findings and conclusions. In seeking review of the hearing officer's findings, Petitioner again urged that footnote 2 was but a critique of an appellate decision as result-based ignoring law and fact. It was not meant by the speaker or understood by the bench, bar or legal writers to accuse judges of misconduct or to challenge their integrity – as demonstrated by more than 1200 cases and more than 3000 law journal articles in which such language appears. As he had done before the hearing officer, Wilkins urged that such speech was protected by the First Amendment,[5] first because it was incapable of being proven true or untrue as an opinion under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) and second because there was no showing of actual malice –

4. Under Indiana's disciplinary scheme, the Supreme Court makes the final decision regarding attorney violations and discipline. The hearing officer merely takes evidence and makes recommendations to the court.

5. The First Amendment restrictions apply to the States through the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Bridges v. California*, 314 U.S. 252, 268 (1941); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *New York Times Company v. Sullivan*, 376 U.S. 254, 276 (1964), and *Garrison v. State of Louisiana*, 379 U.S. 64 (1964).

both properly the Disciplinary Commission's burden as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964). (Respondent's Petition for Review of Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendation, p. 3, Brief in Support, p. 10-14, and Reply Brief, pp. 7-9.) Indeed, there was not even a scinitilla of evidence to contradict Petitioner's testimony on either issue, let alone clear and convincing evidence of Petitioners guilt. The Indiana Supreme Court decided the First Amendment issue, *infra*.

Petitioner's Second Punishment By the Indiana Supreme Court.[6] On review of the findings, three of the five justices, in a Per Curiam Opinion, nevertheless found that Respondent violated Rule 8.2(a) by footnote 2 and punished Petitioner again, this time levying a thirty-day suspension from the practice of law.[7] *Wilkins I*, 777 N.E.2d at 717-19 (App. 7a-12a).

Although the Per Curiam recognized "the Constitutional tension between the First Amendment and the Code [of Professional Conduct]," it rejected the applicability of *New York Times* without discussion, concluding that "a generalized test [for attorney speech] cannot be drawn. . . ." *Id.* at 716 (App. 8a) (citation omitted). To reach its conclusion on the constitutional issues, the Per Curiam looked solely[8] to

6. As noted, the Supreme Court was not unfamiliar with the matter as it had previously sanctioned Petitioner by striking the transfer brief. *See* n.3, *supra*.

7. The Per Curiam did not adopt the hearing officer's findings but made new findings.

8. The Per Curiam refused to confront *New York Times*, *Milkovich* and the meaning of "result-based ignoring law and fact" as demonstrated by the repeated use of such a critique in dissents (Cont'd)

its prior discussion of free speech and attorneys in *In Re Friedland*, 416 N.E.2d 433 (Ind. 1981), which not only predated Rule 8.2(a), but which relied on attorney First Amendment cases involving only commercial speech.[9] The Per Curiam then placed the burden of proof on Petitioner – again rejecting without addressing *Milkovich* – and held that Petitioner "offered no evidence to support his contentions that, for example, the Court of Appeals was determined to find for the appellee, no matter what. Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission."[10] *Id.* at 717 (App. 9a).

(Cont'd)

and law journals, as urged by Wilkins. Rather, Per Curiam erroneously stated (*see* Petition, Brief in Support and Reply as cited at p. 5, *supra*) that: "in his petition for review, the respondent argues that the application of Prof. Cond. R. 8.2 in this case would be an unconstitutional restriction of free speech. However, he provides no authority specifically illustrating why or how his statements are protected by state or federal constitutional provisions." 777 N.E.2d at 716 (App. 7a). And further the Per Curiam stated: "We are not persuaded by respondent's contention (again unsupported by any cited authority) that his statements are merely a 'critique of the Opinion in a format used throughout the bench, bar and journals.'" 777 N.E.2d at 718 (App. 9a).

9. *Friedland* involved extreme conduct in which the attorney engaged in a practice of intimidation and abusive litigation in an attempt to influence public officials, adverse witnesses, and the Disciplinary Commission and staff. 416 N.E. 2d at 438.

10. The Per Curiam Opinion also contravenes the First Amendment by determining that even if the charges were true, Wilkins must confine such charges to the Judicial Qualifications Commission. Not only is such holding contrary to fundamental First Amendment precepts, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829

(Cont'd)

Two justices offered strong dissents that focused squarely on the First Amendment issues raised by Wilkins. Justice Sullivan wrote that footnote 2 was "a statement of 'rhetorical hyperbole,' incapable of being proven true or false," and therefore was protected by the First Amendment. *Id.* at 719 (App. 12a) (citing *Standing Comm. on Discipline of the United States Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1438, 1441 (9th Cir. 1995)). Justice Boehm wrote that footnote 2 was protected speech under the First Amendment because there was no evidence to support the "actual malice" test of *New York Times*, which must apply "to determinations that an ethics violation has occurred by expressing criticism of a legal opinion." *Id.* at 720 (App. 14a). Justice Boehm further warned that the Court, being the "victim", "judge, jury, appellate reviewer" and prosecutor, should exercise "the utmost restraint in imposing discipline for expression of criticism of the courts" (*id.*) (App. 15a) – echoing this Court's observation from *New York Times* that judges need be able to "thrive in a hardy climate." (Citing *Craig v. Harney*, 331 U.S. 367, 376 (1947)).

Recusal And Rehearing. Following the Per Curiam decision, Petitioner moved for rehearing on the First Amendment issues and because Justice Rucker, who cast the deciding vote in the Per Curiam opinion, had not recused himself even though he had been on the three-judge appellate panel that the Commission alleged was impugned by footnote

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(1978) (First Amendment bars criminal punishment of persons for divulging truthful information regarding judges' misconduct as neither the reputation of a judge nor judicial integrity are sufficient to justify punishment of speech), but it directly limits attorneys' ability to protect their clients' interests.

2. Justice Rucker ultimately recused himself,[11] but did so before voting on rehearing, thus locking in his third and decisive vote as part of the Per Curiam rejecting Petitioner's First Amendment challenge.[12] Justice Rucker explained that he had forgotten his earlier participation in the *Michigan Mutual* case, a fact that calls into question both whether the members of the Per Curiam had read the *Michigan Mutual* case before levying discipline and whether the language in footnote 2 was as harsh and "scurrilous and intemperate" as the Per Curiam concluded.

As expected, on rehearing the remaining justices split 2-2 on the conviction. Hence, *Wilkins I* remains the Court's decision on the First Amendment issues. However, three of the four remaining justices voted to reduce the thirty-day suspension to a public reprimand. *In re Wilkins*, 782 N.E.2d 985 (Ind. 2003) (App. C) ("*Wilkins IV*"). Because Justice Rucker did not participate, the reprimand was the result of a compromise by Justice Boehm, who concurred in the sanction only to ensure that Petitioner did not receive a suspension from the practice of law for what Justice Boehm

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11. *In re Wilkins*, 780 N.E.2d 842 (Ind. 2003) (App. B) ("*Wilkins III*"). An earlier reported decision granted Wilkins' motion to stay the suspension pending appeal. 778 N.E.2d 1290 (Ind. 2002) ("*Wilkins II*").

12. Indiana appellate practice requires that a majority of the court vote for rehearing. Given that the case was decided by a 3-2 vote, Wilkins faced the likelihood that if Justice Rucker recused before voting on rehearing, the Per Curiam decision would stand. *See Nat. City Bank, Inc. v. Shortridge*, 691 N.E.2d 1210, 1211 (Ind. 1998). As discussed below, this would have happened but for Justice Boehm's decision not to let the technicality overrule common sense and fairness.

firmly believed to be constitutionally protected speech. *Id.* at 987-988 (App. 32a-34a). Justice Sullivan stood by his dissent.

Reciprocal Enforcement Denied By Federal District Court, Southern District of Indiana. Within weeks of the Indiana Supreme Court issuing *Wilkins IV*, the United States District Court for the Southern District of Indiana issued an order to show cause why it should not impose reciprocal discipline on Petitioner. Under S.D. Ind., Disciplinary Rule, II.D, following the criteria set forth by this Court in *Selling v. Radford*, 243 U.S. 46 (1917), the District Court was required to impose reciprocal discipline unless it clearly appeared: (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept its final conclusion on that subject; or (3) that the imposition of the same discipline by the court would result in grave injustice; or (4) that the misconduct established is deemed by the court to warrant substantially different discipline.

In responding to the show cause order, Wilkins made exactly the same arguments and cited exactly the same cases he had before the Indiana Supreme Court, arguing that the speech in footnote 2 was protected by the First Amendment. After due consideration, the Chief Judge of the District Court explicitly found "that the Respondent has shown cause why this Court should not impose discipline identical to that imposed by the Indiana Supreme Court," and no discipline was imposed. (App. 35a).

REASONS FOR GRANTING THE WRIT

Summary. At the most fundamental level, this case is about whether attorneys enjoy the First Amendment right to advocate, to criticize the judicial branch of their government without fear of reprisal. The Indiana Supreme Court has joined a growing number of state courts in creating a double standard pursuant to which attorneys critical of the judiciary can expect far less First Amendment protection than critics of officials in the other branches. Under the banner of promoting public confidence in the judiciary – by wielding judicial power to silence advocacy – these courts have achieved a result contrary to that stated goal.

This case is worthy of this Court's attention both to put a halt to this disturbing trend and to resolve the deep split, aggravated by the Indiana Per Curiam, in the state high courts' application of the First Amendment standards in this context (including *New York Times*, *Garrison*, *Hepps* and *Milkovich*[13]). Some high courts reject both actual malice and placing the burden of proving falsity upon the charger, so that speech incapable of being proven true or false is not protected, while other state high courts reject only actual malice, and the increasingly-isolated minority require full First Amendment protection.

The Indiana court and like-minded state high courts around the country have gradually and insidiously transformed the shield provided by *New York Times* into a sword whereby Rule 8.2(a) is used by the judiciary to punish, if not silence, critics and limit advocacy. This has led courts

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13. *Garrison v. State of Louisiana*, 379 U.S. 64 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

to punish attorneys for contending that a court "ducked" constitutional issues, made a "politically motivated" decision, was "intellectually dishonest", made a "highly unethical and biased" decision or, as in this case, made a result-based decision in disregard of law and fact. In contrast, other courts, in keeping with this Court's precedents, have upheld the constitutional imperative of protecting advocacy rather than judicial sensibilities and have found, as did the two dissenters of the Indiana court, that advocacy of the foregoing variety is mere "rhetorical hyperbole" – protected speech, incapable of being proven true or false, and therefore protected by the First Amendment.

This Court has recognized again and again that "the ultimate responsibility to define the limits of State power regarding freedom of speech and expression rests with this Court." *Wood v. Georgia*, 370 U.S. 375, 386 (1962); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 282 (1974). The First Amendment limits on a court's power to act as the victim, prosecutor, judge, jury, and appellate reviewer to punish attorney advocacy critical of courts is badly in need of this Court's attention.

Split Among State Supreme Courts And The Circuits. The state high courts are widely split on the extent of First Amendment protection for attorneys critiquing the judiciary. Many have rejected, or simply ignored,[14] that *New York Times*,

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14. *See In re Graham*, 453 N.W.2d 313, 320 (Minn. 1990), *cert. den. sub nom., Graham v. Wernz*, 498 U.S. 820, (1990) ("neither Minnesota courts nor the United States Supreme Court have expressly extended the constitutional qualified privilege beyond the facts of civil and criminal proceedings to attorney discipline ones."); *In re Green*, 11 P.3d 1078, 1083 (Colo. 2000) ("because neither we nor the Supreme Court has addressed the First Amendment

(Cont'd)

Garrison, *Hepps* and *Milkovich* determined the issues, which then leaves them free to develop their own standards giving attorneys less First Amendment protection to advocate critically and the judiciary more power to chill advocacy. Some ignore all First Amendment standards, others reject the requirement of actual malice, others reject the burden of proving falsity (and hence the protection for opinion as incapable of being proven true or untrue). This is so, despite most state high courts having adopted ABA Model Rule 8.2(a), which was intended to incorporate the very standards these courts have rejected.[15] When confronted with

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implications of disciplining attorneys for their criticism of the judiciary, we look by analogy to *New York Times Co. v. Sullivan*. . . ."); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991), *cert. den.*, 502 U.S. 1009, (1991) ("some courts have simply refused to apply the *New York Times* test, holding it inapplicable to a disciplinary proceeding"); *Matter of Johnson*, 240 Kan. 334, 729 P.2d 1175, 1180-81 (1986); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94, 95 (1979), *cert. den. sub nom.*, *Terry v. Indiana Supreme Court Disciplinary Comm'n.*, 444 U.S. 1077 (1980)).

15. *See In re Green*, 11 P.3d at 1084 n.4 "indeed, . . . RPC 8.2(a) incorporates the *New York Times* standard. . . ."; *In re Graham*, 453 N.W.2d at 321, *cert. den.*, 498 U.S. 820 (1990):

> commentators have noted that Rule 8.2, ABA MRPC, is consistent with the constitutional limits placed on defamation actions by the United States Supreme Court cases of *New York Times* and *Garrison*. *See, e.g.*, *Hazard & Hodes*, *supra*, at 552-54. Nevertheless, the standard cannot be equivalent to that of *New York Times* and its progeny, because the standard for determining actual malice must be objective when dealing with attorney discipline.

conduct deemed unacceptable, these high courts simply amend "on the run" Rule 8.2(a) and the First Amendment.

States Rejecting New York Times/Milkovich. In *Wilkins I*, Indiana joined those state high courts which simply ignore *New York Times/Milkovich*. See *In re Wilkins* I (imposing the burden of proving truth upon the speaker[16] of a matter not capable of being proven untrue, ignoring *New York Times*, *Garrison*, *Hepps*, *Milkovich* and Rule 8.2(a)); *In re Frerichs*, 238 N.W.2d 764, 766, 767 (Iowa 1976) (disciplining an attorney for stating in a petition for rehearing that the Court "willfully avoided" or "ducked" constitutional issues properly raised, rejecting out of hand the First Amendment because the "conduct here involved is generally held not protected by freedom of speech guarantees under the first amendment," in contravention of *New York Times* and *Garrison*);[17] *State v. Nelson*, 504 P.2d 211, 214-15 (Kan. 1972) (rejecting the applicability of First Amendment protection as "untenable because *New York Times* case law is clearly inapplicable to a disciplinary proceeding because

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16. Other cases avoid the burden of proof requirement, much like the Indiana Per Curiam, but focus on the factual basis for the statement at issue. *See In re Westfall*, 808 S.W.2d 829 (Mo. 1991) (affirming a disciplinary finding against an attorney for accusing a judge of being "intellectually dishonest" based on a failure to investigate, as opposed to whether there was proof of the accusation being untrue).

17. Subsequently, the Iowa Supreme Court further explained *In re Frerichs* stating: "In *Frerichs*, we . . . recognized a lawyer acting in a professional capacity, may have some fewer rights to free speech than would a private citizens *In re Sawyer*, 360 U.S. 622, 646-47 (1959) (Stewart, J., *concurring*). . . ."

such cases . . . deal with constitutional privilege afforded news media" and "an individual respondent has no constitutional privilege to defame. . . ."); *Kentucky Bar Assoc. v. Heleringer*, 602 S.W.2d 165 (1980), *cert. den. sub nom., Heleringer v. Kentucky Bar Association*, 449 U.S. 1101, (1981) (disciplining an attorney for stating to the press that a judge's decision was "highly unethical and grossly unfair," rejecting First Amendment considerations based on *In re Frerichs*); *In re Holtzman*, 577 N.E.2d 30, 32 (N.Y. 1991), *cert. den. sub nom., Holtzman v. Grievance Committee For Tenth Judicial Dist.*, 502 U.S. 1009, (1991):

> neither this Court nor the Supreme Court has ever extended the *New York Times* standard to lawyer discipline and we decline to do so here. . . . Such standard would be wholly at odds with the policy in *Rules Governing Professional Responsibility* which seeks to establish a 'minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.'

States Rejecting Actual Malice. Other state high courts for inexplicable reasons reject the actual malice standard of *New York Times/Garrison* for attorney speech critical of the judiciary based upon the judiciary's belief that public confidence in the judiciary and administration of justice is deserving of more protection than the state interests involved where the speaker is challenging the other branches. Those state high courts have generally followed the Minnesota Supreme Court, which rejected the actual malice test, lowering the First Amendment protection to objective malice under a reasonable attorney standard for an attorney charged with making an untrue statement impugning the integrity of a judge. *See In re Graham, supra*, in which the Minnesota Supreme Court adopted a purely

subjective standard, reasoning that, even though Rule 8.2(a) incorporated *New York Times/Garrison* standards, actual malice would not be required because of the dissimilarity between defamation, which protects but a private wrong, and Rule 8.2, which encompasses a "much broader spectrum . . . in promoting the public, the administration of justice and the profession." *See also In re Topp*, 925 P.2d 1113 (Idaho 1996), *cert. den. sub nom., Topp v. Idaho State Bar*, 520 U.S. 1155, (1997) (disciplining an attorney who accused a judge of making a politically motivated decision, based on the Court's conclusion that "a reasonable attorney . . . would not have made this statement in question"); *United States District Court for Eastern Dist. of Washington v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); and *Yagman*, 55 F.3d at 1436 (in rejecting actual malice, the Court explained "there are significant differences between the interest served by defamation law and those served by Rules of Professional Ethics. . . . Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges . . . but to preserve public confidence . . ."); [18] *Florida Bar v. Ray*, 797 S.2d 556, 559 (Fla. 2001), *cert. den. sub nom., Ray v.*

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18. Although it rejected acted malice, the Ninth Circuit correctly imposed the burden of proving falsity on the charger, as has Idaho, which adopted the Ninth Circuit approach. *See Standing Committee on Discipline v. Yagman*, 95 F.3d 1430 (9th Cir.) (accusation that a judge "has a penchant for sanctioning Jewish lawyers" was incapable of being proven true or untrue, which under *Milkovich* was protected under the First Amendment. The State failed to discharge the burden of proof the attorney's accusation that the judge was "drunk on the bench" was untrue, as required by *Hepps*). However, *Yagman* has been rejected by Delaware and the Seventh Circuit. *See In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (attorney disciplined for accusation that a judge suffered a "progressive mental disability" affirmed based on the absence of "some factual basis for the lawyer's accusation"); *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995).

Florida Bar, 535 U.S. 930, (2002) (attorney disciplined for challenging the fairness and integrity of an administrative law judge in a letter to the Chief Immigration Judge, based on the court's determination that under an objective standard, nothing had transpired in an earlier hearing to justify the accusations).

Minority Upholds First Amendment. The better reasoned, but increasingly isolated, state high court opinions accept and apply the same First Amendment standards to attorney speech critical of the judiciary as this Court has developed to protect these who critique public officials in the other branches. *See In re Green*, *supra*, (requiring proof of a false statement of fact "which the attorney uttered . . . with actual malice" in finding an attorney's accusation that a judge was a "racist and bigot" was an opinion not capable of being proven true or false and therefore was protected under *Milkovich*); *State ex rel. Oklahoma Bar Ass'n v. Porter*, 766 P.2d 958, 968 (Okla. 1998) (rejecting disciplining an attorney for accusing a judge of being a "racist" because under the First Amendment "the statements were not shown to be incorrect statements of fact . . . no evidence was introduced to demonstrate that the statements were false . . ." as required by *Hepps* and *Milkovich*); *Committee on Legal Ethics of West Virginia State Bar v. Douglas*, 370 S.E.2d 325 (W. Va. 1988) (attorney charged with professional misconduct for accusing a judge of an investigation that was a "farce" or "political" which pursuant to *New York Times* and *Garrison* could not be made with knowledge of falsity or in reckless disregard of whether true or untrue); and *State Bar v. Semaan*, 508 S.W.2d 429 (Tex. App. 1974) (reversing grievance committee's finding of unprofessional conduct by an attorney's letter which agreed with a newspaper critique of a judge as to knowledge of the law and courage to rule fairly and harshly, based on *New York Times* and *Garrison*).

Judicial Protectionism Damages The Judiciary. The reasoning of those state high courts which have held *New York Times* and *Garrison* inapplicable to attorney discipline cases is so vacuous as to suggest judicial protectionism.[19] To say that Mr. Garrison, a Louisiana prosecutor, should receive less First Amendment protection against being disciplined by the Louisiana Supreme Court for suggesting "racketeering influences on our eight vacation minded judges" than when he was convicted of criminal defamation is unsupportable. Yet, this is the position of an increasing body of state high court decisions – elevating the judiciary above public officers in the other branches, while limiting criticism from those best suited to make it.

The irony is that these state high courts pay no heed to the genesis of *New York Times*, *Garrison*, *Hepps* and *Milkovich* – that public officials should receive no more protection than judicial officers against critical speech. In *New York Times*, this Court noted that

> concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt

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19. For instance, the Minnesota Supreme Court in *Graham* rejected these First Amendment standards because "defamation is a wrong directed at an individual" while "criticism impugning the integrity of [a judge] adversely affects the administration of justice" (453 N.W.2d at 321). Similarly, the Ninth Circuit concluded that, because "false statements impugning the integrity of judges erodes public confidence without serving to publicize problems that justifiably deserve attention," the *New York Times* standards are somehow inapplicable. *In re Yagman*, 55 F.3d at 1437. The Indiana Per Curiam rejects these standards, without discussion, over two dissents and briefs properly framing them, and concludes again that public confidence in the judiciary required Petitioner to come forth with proof of truth, as opposed to the charger proving falsity.

> of criticism of the judge or his decision. . . .[20] This is true even though the utterance contains 'half truths and misinformation.'[21] Such repression can be justified, if at all, only by clear and present danger of the obstruction of justice. . . .[22]

376 U.S. at 272-273. From this history, the Court concluded that "if judges are to be treated as 'men of fortitude, able to thrive in a hardy climate', surely the same must be true of other government officials. . . ." 376 U.S. at 273.

In *Garrison*, this Court established that the reasons leading to *New York Times* "apply with no less force merely because the remedy is criminal. . . ."[23] 379 U.S. at 73. Attorney discipline for speech, being quasi criminal, *In re Ruffalo*, 390 U.S. 544, 551 (1968), can be entitled to no less First Amendment protection. This Court has established that public officials can impinge on freedom of expression no more than judicial officers – surely judicial officers cannot at this late date flip the proposition to become exulted over all other public officials.

While this Court has lessened the protection for speech concerning private figures[24] or where a private figure and

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20. *Bridges v. California*, 314 U.S. 252 (1941).

21. *Pennekamp v. Florida*, 328 U.S. 331, 342 (1946).

22. *Wood v. Georgia*, 370 U.S. 375 (1962).

23. "The 'erroneous statement is inevitable in free debate' . . . Only those false statements made with a high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions."

24. *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

speech of purely private concerns are involved,[25] surely attorney advocacy and criticism of the judiciary do not fall within such parameters. Moreover, where the burden of proof of falsity is concerned, speech incapable of being proven true or untrue, as an opinion, is fully protected at all levels. No rationale can support the Indiana Per Curiam placing the burden on Petitioner to come forth with evidence to prove the truth of a matter which is so clearly incapable of being proven true or untrue – that the Court reached a result-based decision ignoring law and fact or, as in the other State cases, that a state supreme court "ducked" constitutional issues, or was "intellectually dishonest", etc.

What these cases suggest is over sensitivity to criticism and under sensitivity to the damage from being overly-protective. Although courts frequently justify their decision to restrict attorney speech on a desire to further public confidence in the judiciary, in truth they are producing the opposite result. The reaction of the public and legal scholars to the Indiana Supreme Court decision vividly illustrates the public's loss of confidence in the judicial system when the judiciary is unable or unwilling to tolerate even mild attorney criticism of a type commonly engaged in by judges themselves.[26] Ignoring the First Amendment in the name of

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25. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

26. *See* Adam Liptak, "Indiana Court Bars Lawyer For Criticizing An Opinion," *New York Times*, November 3, 2002 (Exhibit 1 to Petitioner's Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Steven Lubet, "Free speech rights don't end in courtroom," *Chicago Sun-Times*, November 6, 2002 (Exhibit 3 to Petitioner's Consolidated Petition for Rehearing and Motion for

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judicial protectionism does more to harm the public's confidence in the judiciary than any amount of judicial criticism in the course of advocacy.

CONCLUSION

Appellate advocacy by its very nature requires critical analysis of judicial reasoning. A growing body of state high courts are elevating the importance of the judiciary over the other branches by limiting First Amendment protections for attorney advocacy critical of the judiciary. These courts have used their disciplinary powers, powers not available to any other branch, in a manner which inhibits and chills (if not altogether precludes) open, vigorous analysis and debate as to the correctness of judicial decisions. Counsel for Mr. Wilkins have indeed been chilled in drafting this very petition – for if there were ever a decision deserving[27] critique in the words commonly used by the bench, bar and legal writers (which critique counsel cannot now make) – *Wilkins I* is it.

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Justice Rucker to Recuse); "Court Assaults on Free Speech," *Fort Wayne Journal-Gazette*, Nov. 10, 2002 (Exhibit 4 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Steven Lubet, "Tempest in a Petition for Transfer, *The Legal Times*, December 2, 2002 (Exhibit 9 to Reply Brief on Petitioner's Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); John Strauss, "Let he who has not spoken out cast the first suspension," *The Indianapolis Star*, December 6, 2002 (Exhibit 10 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse); Paul McAuliffe, "Too quick to discipline," *Evansville Courier & Press*, December 15, 2002 (Exhibit 11 to Petitioner's Reply Brief on Consolidated Petition for Rehearing and Motion for Justice Rucker to Recuse).

27. *See* n.8, *supra*.

As demonstrated above, this is not a phenomenon limited to Indiana. It is a nationwide problem: worthy of this Court's attention. For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

G. DANIEL KELLEY, JR.
Counsel of Record
THOMAS E. MIXDORF
EDWARD P. STEEGMANN
ICE MILLER
One American Square
Box 82001
Indianapolis, Indiana 46282
(317) 236-2100

RONALD E. ELBERGER
BOSE MCKINNEY & EVANS LLP
2700 First Indiana Plaza
135 N. Pennsylvania Street
Indianapolis, Indiana 46204
(317) 684-5000

Counsel for Petitioner